Supreme Court, U.S.
FILED
OCT 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-552

IN THE

Supreme Court of the United States

October Term, 1986

HUBBARD BROADCASTING, INC.,

Petitioner,

vs.

METROPOLITAN SPORTS FACILITIES COMMISSION; AMERICAN SIGN AND INDICATOR CORPORATION; TWIN CITIES FEDERAL SAVINGS AND LOAN ASSOCIATION; AND AMERICAN SIGN AND INDICATOR CORPORATION / TWIN CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, A JOINT VENTURE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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1986—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

QUESTIONS PRESENTED FOR REVIEW

1. In a public facility operated by the government in a proprietary capacity, space was created for and designated to a class of private expression. Do limitations on the amount of space so dedicated and the number of private persons granted access to it prevent that space from being a limited public forum for the class of speech to which it is dedicated?

2. For purposes of assessing whether the creation and sale of an exclusive right to speak on a subject at a public facility comply with the requirements of the First and Fourteenth Amendment, is more than minimal scrutiny applicable where the exclusive does not arise from a governmental desire to suppress any particular point of view but it has the necessary effect of discriminating between the viewpoints of equally situated persons?

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PETITION FOR WRIT OF CERTIORARI

The petitioner Hubbard Broadcasting, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 8, 1986.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit, 797 F.2d 552 (8th Cir. 1986) is reproduced at A-1. The Opinion of the United States District

Court for the District of Minnesota dated August 20, 1984 (unpublished) is reproduced at A-12.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit in this case was entered July 8, 1986. This case arises under the United States Constitution, Amendments I and XIV. Federal Jurisdiction is founded upon 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1) and 2101(c) to review the decision of the Court of Appeals.

STATEMENT OF THE CASE

Petitioner Hubbard Broadcasting, Inc. ("Hubbard")[1] is a local broadcaster with television and radio stations in Minneapolis/St. Paul and elsewhere. Midwest Radio-Television, Inc. ("Midwest"), not a party to this action, is a local broadcaster with television and radio stations in Minneapolis/St. Paul, including WCCO-TV, WCCO-AM and WLTE-FM (collectively "WCCO"). In regular competition with Hubbard, WCCO telecasts and broadcasts news, entertainment and other programming to viewers and listeners in a telecasting and broadcasting area which is substantially the same as that of Hubbard's Minneapolis/St. Paul stations.

Respondent Metropolitan Sports Facilities Commission (the "Commission") is a public body created by the Minnesota Legislature to own and operate certain public sports facilities, including the Hubert H. Humphrey Metrodome

[1]Supreme Court Rule 28.1 listing: Hubbard has no parent company. Hubbard has a number of wholly-owned subsidiaries, e.g. KSTP-AM, Inc. and KTSP-FM, Inc. Hubbard has a subsidiary, Hubcom, Inc., which is not wholly owned. Hubbard is the general partner in Conus, a limited partnership.

(the "Stadium") in Minneapolis, Minnesota. The Stadium was constructed with public money, it is supported in part by local taxes, and it was created and has been used for athletic, educational, cultural, commercial and other entertainment, instruction and activity for the citizens of the Minneapolis/St. Paul metropolitan area. Respondent American Sign and Indicator Corporation ("ASI") manufactures scoreboard systems and markets display advertising on scoreboard panels for stadium and sports arenas throughout the country. Respondent Twin Cities Federal Savings and Loan Association ("TCF") in a federal savings and loan institution, in Minneapolis, Minnesota. In 1981, ASI and TCF formed Respondent joint venture ("ASI/TCF") in an effort to obtain the right to provide a scoreboard system for the Stadium in exchange for all the advertising rights in the Stadium.

The Commission, as a necessary precondition to and in anticipation of constructing the Stadium, entered into "use agreements" with the Minnesota Vikings and the Minnesota Twins sports teams which required the Stadium to be equipped with a "scoreboard system." The Legislature limited the total construction cost of the Stadium, and because of other needs there was no money in the budget for a scoreboard system. Accordingly, the Commission designated specific space in the Stadium for commercial advertising and bartered for the scoreboard system. In exchange for a "free" scoreboard, the manufacturer was authorized to sell the designated advertising space and keep at least $5,000,000 in future advertising revenues.

During the negotiations, ASI/TCF informed the Commission that it intended to sell advertising on the scoreboard system on an exclusive by product category basis. Dep. Ex.

5, App. 312.[2] ASI had targeted certain product categories as likely advertisers, e.g. a beer company, a tobacco company, a financial institution and a local broadcaster, but it intended to allow only one advertiser from each category to use the scoreboard system.

After this practice was challenged by Hubbard, the defendants said that the practice was designed to maximize revenues. The Commission, however, conceded that it had made no effort to determine whether advertising exclusives would maximize its revenue. Poss App. 234. ASI/TCF conceded that it did not know whether scoreboard advertising could have been sold as profitably on a nonexclusive basis. Turner App. 256.

On or about January 28, 1981, the Commission executed the scoreboard contract (Dep. Ex. 18, App. 323) with ASI/TCF which provided, *inter alia* that the Commission:

> "will not permit any advertising on the Stadium site, either visual or audio, which would be directly competitive with any contracted advertising for the scoreboard system"

As a result, the advertising exclusives which ASI/TCF sold on the scoreboard system prevented another advertiser from advertising anywhere in the Stadium, including in other areas that the Commission opened for commercial advertising, if it competed with one of ASI/TCF's advertisers.

On or about March 1, 1982, ASI informed Hubbard that it was selling scoreboard advertising and would call Hubbard on March 2 for an appointment to discuss "this unique advertising media." Dep. Ex. 23, App. 342. Hubbard was not told that advertising space was limited to only one

[2]App. — citations are to the Joint Appendix filed with the Eighth Circuit.

broadcaster or that advertising would be sold on a first approached basis. On or about March 2, 1982, without making any presentation, or otherwise granting Hubbard an opportunity to bid or negotiate for scoreboard or other display advertising in the Stadium, ASI sold a ten year exclusive WCCO. In light of this exclusive, ASI refused to discuss with or grant scoreboard advertising to Hubbard even though space on the scoreboard and elsewhere in the Stadium was available.

Hubbard immediately demanded that the defendants permit it to compete on an equal basis to purchase or rent such portions of scoreboard or Stadium advertising as were available to similarly situated advertisers. Dep. Ex. 50, App. 354. While space for scoreboard and other Stadium advertising was (and for several years thereafter still remained) available, Hubbard was denied the opportunity for any Stadium advertising.

PROCEEDINGS BELOW

In September 1982, Hubbard brought an action alleging that the respondents had violated (1) Hubbard's federal and state constitutional rights of free speech and equal protection, (2) federal and state antitrust laws, and (3) state public bidding and delegation laws. Federal jurisdiction was based, *inter alia* on 28 U.S.C. § 1331.

The District Court for the District of Minnesota granted respondents' motion for partial summary judgment and dismissed Hubbard's federal and state constitutional claims and state unlawful delegation claim. The District Court later granted Hubbard's motion for summary judgement on the public bidding claim and invalidated the scoreboard

contract. Hubbard voluntarily dismissed its federal and state antitrust claims.

On cross-appeals, the Eight Circuit Court of Appeals certified to the Minnesota Supreme Court pursuant to Minn. Stat. 480.061 the state law issues of public bidding and unlawful delegation. The Minnesota Supreme Court responded that the applicable public bidding statute had not been violated in the letting of the scoreboard contract and that there had not been an unlawful delegation by the Commission in the scoreboard contract. *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission,* 381 N.W.2d 842 (Minn. 1986). The Eighth Circuit Court of Appeals affirmed the decision of the District Court on the federal and state constitutional issues. It applied minimal scrutiny to the reasons for allowing WCCO to advertise in the Stadium but denying Hubbard the same right even though space was available, and concluded that Hubbard's constitutional rights of free speech and equal protection had not been violated because it held that the designated advertising space in the Stadium was a nonpublic forum, the advertising exclusives were not viewpoint discriminatory, and such exclusives were sold on a neutral, first come/first served basis.

REASONS FOR GRANTING THE WRIT

The number of speakers seeking display space to communicate messages to the public continues to grow. At the same time, formerly available display spaces, such as billboards, are being restricted more and more. Additionally, the gathering places are changing. The government now controls more and more of the most effective locales for public speech, but these locales are not what the Court has called "traditional" public fora.

In an effort to accommodate the ever growing extension of government control over more and more means of expressive activity, and the attendant First Amendment issues, the Court has recognized fora for the exercise of free speech that were not public fora by tradition. The Court now recognizes a class of public fora created by the government's acquiescence in the public's use of public property for expressive activity which is compatible with the normal uses of the property. The Court's cases recognize that the government is allowed to use its property in the manner intended by the legislature in creating the public property, but once it has acquiesced in the use of the property for private expressive activity, the government does not have the same latitude as a private person in picking and choosing who will be permitted to exercise similar expressive activity on that property. When the government acts in its commercial capacity to restrict expressive activity, its justification must be closely scrutinized. If by policy or practice, the government has opened a public facility to a particular class of speakers for particular expressive activity, then a limited public forum has been created for that class of speakers and subject matter, and all entities of similar character have a constitutional right of equal access.

The decision below has turned the intent of the Court in recognizing limited public fora on its head. The limited public forum doctrine was developed in recognition of the new public gathering places, and provided that the government should have real and substantial reasons before it can restrict private speech which is compatible with the facility. The ruling below, however, permits any speech restriction which the government can rationalize to deny the existence of a limited public forum.[3] This prevents the

application of anything other than minimal scrutiny to the speech restriction at issue. Even where, as here, public space has been created for the type of speech at issue, restrictions upon speech will no longer be scrutinized in the Eighth Circuit.

The Court's most recent pronouncement on public forum analysis, *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. —, 87 L.Ed.2d 567 (1985), was decided after this case was submitted to the Eighth Circuit. Without the benefit of argument of the parties as to its impact, the Court below misconstrued the plurality opinion in *Cornelius*. Without regard to the fact that Hubbard's proposed speech was compatible with the purposes for which advertising space was created and dedicated, without regard to the fact that space was available at the time Hubbard applied for speech rights (and for years thereafter), and without regard to the effect the exclusive necessarily had on a competitor, the Eighth Circuit allowed the *existence* of some governmental limitation on expressive activity to preclude a finding that the advertising space was a limited public forum. In doing so, the ruling empties the limited public forum doctrine of any substance.

The ruling below also emasculates the requirement of viewpoint neutrality at a public facility. It permits the

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[3]The basis for the lower court's ruling was that ASI/TCF, a private party, determined that 10 year advertising exclusives would raise more money. This ruling was without regard to the uncontradicted evidence that the Commission did not believe an exclusive was necessary and ASI/TCF never investigated whether a non-exclusive could be profitably sold. The fact that Hubbard was and is prepared to pay the going rate even on a non-exclusive basis shows the error in the ruling below. Moreover, the ruling below merely assumed that revenue maximization was reasonable and justified the discrimination under a minimal rule of rationality test, rather than examining the restrictions under the stricter level of scrutiny required in First Amendment cases.

government to pick and choose between similarly situated competing speakers, each wishing to engage in expressive activity in a public facility in a manner compatible with the purpose of the public facility. The ruling below further permits the government to allow one who is permitted to speak in a public facility to pay to silence another similarly situated speaker.

The Court has made it clear that even a restriction which is content neutral on its face may nonetheless be invalid if it is a covert means of discrimination. The ruling below validated a restriction which was overtly discriminatory because it found that the restriction was not designed to suppress a particular point of view. The Court has by implication suggested, and other courts have expressly found, that such a restriction is invalid without regard to the government's motive. The Court should accept review to address directly this open violation which is *a fortiori* in the light of the Court's other cases.[4]

Further emasculating the requirement of viewpoint neutrality, the ruling below equated a "first approached/first served" policy with a true "first come/first served" policy. The ruling below thus permits the government to select who will be permitted to speak by the arbitrary order in which it makes its sales calls on similarly situated speakers.

The ruling below conflicts in principle with other circuit courts on the public forum analysis and on the viewpoint neutrality analysis; it conflicts with established Supreme Court precedent; and it will have consequences far beyond the parties to this case.

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[4]Unlike *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. —, 90 L.Ed.2d 480 (1986), where the Court found that there were factual disputes which had to be resolved before the Court could decide the legal question framed by the Ninth Circuit, the facts have been fully developed here.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT CONFLICTS WITH THE PRINCIPLES ARTICULATED BY OTHER CIRCUITS ON THE ISSUES SUBMITTED, NAMELY, THE EXISTENCE OF A LIMITED PUBLIC FORUM AND THE INTERPRETATION OF VIEWPOINT NEUTRALITY.

Three other Courts of Appeals, for the Seventh, Ninth and District of Columbia Circuits, have considered commercial advertising in the context of a public forum analysis. *San Diego Committee Against Registration and the Draft v. Governing Board of the Grossmont Union High School District,* 790 F.2d 1471 (9th Cir. 1986) (*"CARD"*), *Planned Parenthood Association/Chicago Area v. Chicago Transit Authority,* 767 F.2d 1225 (7th Cir. 1985) (*"Planned Parenthood"*), *Lebron v. Washington Metro Area Transit Authority,* 749 F.2d 893 (D.C. Cir. 1984) (*"Lebron"*) and *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States,* 708 F.2d 760 (D.C. Cir. 1983) (*"Dulles"*). In addition, two other Courts of Appeals, for the Third and Ninth Circuits, have considered awards of exclusive rights within a particular class of speakers permitted access to a public facility. *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985) *aff'd and rem'd. sub nom Los Angeles v. Preferred Communications, Inc.,* 476 U.S. —, 90 L.Ed.2d 480 (1986) (*"Preferred"*), *CARD, supra,* and *American Future Systems, Inc. v. Pennsylvania State University,* 752 F.2d 854 (3rd Cir. 1984) *Cert, denied sub nom Johnson v. Pennsylvania State University,* — U.S. — , 87 L.Ed.2d 660 (1985) (*"AFS II"*). On each issue, the decisions and reasoning of the other circuits are inconsistent with the holding of the Eighth Circuit.

A. There is a Conflict Relating to Limited Public Forum Analysis.

Although the Eighth Circuit found that the Commission had specifically designated a portion of the Stadium for commercial advertising of the type proposed by Hubbard, it concluded that the Commission did not demonstrate the intent to designate such space as a public forum for such advertising. Three other circuits under substantially similar circumstances have held to the contrary.

In *CARD*, the Ninth Circuit held that a school newspaper which was devoted entirely to political, commercial, artistic and other expressive activity was a "limited public forum" from which a person opposed to the military could not be excluded from expressing an idea on the same topic allowed to military recruiters. 790 F.2d at 1476. In that case, the Board had permitted military recruiters to advocate military service, but attempted to bar the same type of mixed political and commercial speech to a group opposing military service. Because the Board had allowed military recruiters to use its newspapers to engage in commercial and political speech, the Board's actual policy and practice led to the conclusion that the Board had established the school newspaper as a limited public forum.

In *Planned Parenthood,* the Seventh Circuit held that a transit authority which had allowed access to its property for a wide variety of commercial, public service, public issue and political ads by anyone willing to pay the fee had created at least a limited public forum. 767 F.2d at 1232. In rejecting the application of *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), the Seventh Circuit held that while the interior of buses were not a traditional public

forum, it did not provide that such space may never become a public forum. Because the CTA had accepted advertising of the type proposed by the plaintiff, *Lehman* was not controlling. 767 F.2d at 1233.

In *Lebron,* the District of Columbia Circuit held that advertising space in subway stations which accepted public service and commercial advertisements was a public forum for the kinds of advertisements previously accepted. 749 F.2d at 896. *Dulles* was similar to *Lebron* except that it involved the Dulles Airport rather than Washington subway stations.

The Eighth Circuit thus rejected the analysis that the Seventh, Ninth and District of Columbia Circuits found to be compelling and concluded that notwithstanding the fact that the Commission designated spaces in the Stadium for commercial advertising, the spaces so designated did not constitute a designated public forum for commercial advertising. The ruling below permits the government to allow in a public facility the expression of only one side of an issue — for instance democrats but not republicans, abortionists but not pro-lifers, and military recruiters but not persons against the military — so long as the government is engaged in commerce.

Whether a government official can reject proposed speech compatible with a public facility and similar to that permitted to others, and whether a person can express an opinion on an issue already discussed in a public facility should not depend on the circuit in which the public facility is located. This Court should resolve this difference between the circuits to eliminate the uncertainty for all persons controlling access to public facilities or wanting equal access to public facilities.

B. There is a Conflict Relating to The Interpretation of Viewpoint Neutrality.

The Eighth Circuit found that the exclusive advertising right was content neutral because it was not designed to suppress a "particular" point of view and because it had been awarded on "first come/first served" basis. Its conclusions are contrary to principles enunciated by other circuits.

In *Preferred,* the Ninth Circuit considered the practice of Los Angeles of limiting the number of cable companies in each region that would be allowed to attach its cable to public utility poles. In considering the question of viewpoint neutrality, the Ninth Circuit said:

> While an outright ban would be viewpoint neutral * * * the city's action in the instant case creates an impermissible risk of covert discrimination based on the content of or the views expressed in the operator's proposed programming * * * *Vincent* does not support the City's attempt to single out one cable television company to be the one speaker for expressive purposes, while it forbids access for those purposes to all others.
>
> Allowing a procedure such as the City's would be akin to allowing the government discretion to grant a permit for the operation of newspaper vending machines located on public streets only to the newspaper that the government believes "best" serves the community, a practice which we find clearly invalid.

754 F.2d at 1409. The Ninth Circuit found the award of a speech exclusive at a public facility which was not mandated by space considerations inherently inconsistent with viewpoint neutrality even where all equally situated parties had been given notice and an opportunity to bid for the exclusive.

The Ninth Circuit noted that "The City may not solicit 'bids' from prospective speakers and deny access to its facilities to all save the highest 'bidder' in each region." 754 F.2d at 1409.

In *AFS-II*, Judge Adams in his concurring opinion that Penn State University's restriction of group sales demonstrations to dormitory common areas and not to dormitory rooms themselves was constitutionally permissible, aptly pointed out:

> Similarly, if the University denies access to AFS while allowing Tupperware parties . . . the regulation could not be construed as a content neutral time, place, and manner restriction.

752 F.2d at 869 (Adams, J. concurring).

The Eighth Circuit rejected the neutrality requirement that both the Third and Ninth Circuits found to be essential because it believed Hubbard was rejected because it failed to bid first. The Eighth Circuit further concluded that a "first come/first served" method of allocating limited space was content-neutral despite the fact that there was not even a "first come/first served" basis in the case. The Eighth Circuit failed to recognized that space limitation was no barrier since empty panels were in fact available when Hubbard applied for advertising rights and for years thereafter. In addition, the Eighth Circuit validated a "first approached," not a "first come" method of allocating the exclusives created by ASI/TCF.

The traditions of free speech and equal protection depend on the proposition that speakers and subjects similarly situated will be treated similarly. Whether that principle will be enforceable in the future may now depend on the

circuit in which one tries to exercise speech rights. This Court should resolve this difference between the circuits.

II.

THE EIGHTH CIRCUIT'S INTERPRETATION OF THE LIMITED PUBLIC FORUM DOCTRINE CONFLICTS WITH PRINCIPLES ENUNCIATED IN SUPREME COURT DECISIONS.

The Eighth Circuit correctly concluded that "the crucial question is not whether the Metrodome, as a whole, is a public forum but whether the Commission designated advertising space within the Metrodome a public forum."[5] 797 F.2d at 555. It is undisputed that commercial advertising in general, and Hubbard's proposed advertising in particular, are compatible both with the space dedicated by the Commission for advertising and with the principal function of the Stadium itself. The advertising spaces at issue were designated specifically for and dedicated to commercial advertising — the very type of speech Hubbard proposes. The spaces contain the advertisement of Hubbard's prime competitor — WCCO. Notwithstanding precedent of this Court that these circumstances in themselves create at least a limited public forum,[6] the Eighth Circuit determined that the advertising space in the Stadium is a nonpublic forum.

The Eighth Circuit based its conclusion upon a misread-

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[5]Of course, this does not mean that the Eighth Circuit was permitted to or should have ignored the nature and function of the Metrodome for purposes of determining whether Hubbard's proposed speech was compatible with preserving that facility for its intended purpose. *See Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. , 87 L.Ed.2d 567, 579 (1986).

[6]For example, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975), a designated or limited public forum had been established where a municipal auditorium in a city-leased theater was designated and dedicated for expressive activities.

ing of two plurality opinions by this Court for a proposition which precludes the existence of a "designated" or "limited" public forum where the government has restricted access in the forum. As a result, the Eighth Circuit has rendered the limited public forum doctrine meaningless.

Relying upon the plurality opinion in *Cornelius,* the Eighth Circuit stressed that "[a] public forum is not created when the government permits limited discourse, 'but only by intentionally opening a non-traditional forum for public discourse.' " 797 F.2d at 555. The Eighth Circuit then relied upon the plurality opinion in *Lehman* for the proposition that advertising space which was part of a commercial venture had not been open to issue-oriented advertising which threatened to disrupt the commercial venture. The Eighth Circuit concluded under its reading of *Cornelius* and *Lehman* that because the government (a) was acting in a proprietary capacity and (b) had limited the number of advertising spaces and (c) had sold only to limited number of advertisers in the Stadium, the Commission did not intend to designate the advertising space as a limited public forum.

> When, as here, the city [sic][7] acting in a proprietary capacity, has allowed a small number of commercial advertisers access to a limited amount of advertising space on government property in order to generate revenue, the city has not created a public forum . . .

797 F.2d at 556.

If the Eighth Circuit's analysis is correct, there can never be a limited public forum. It is precisely those facilities

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[7]The Commission which owns and operates the Stadium is not an arm of the City of Minneapolis, but a separate political subdivision created by the State legislature specifically for the purpose of owning and operating major sports facilities in the state.

which are operated in a proprietary or commercial capacity and not traditional public fora which are candidates for limited public forum status. *See e.g., Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (state fairground); *Planned Parenthood, supra* (advertising space on buses, trains and other transit authority property); *Lebron, supra* (subway stations); and *Dulles, supra* (airport). Cf. *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. —, 90 L.Ed.2d 480 (1986) (First Amendment issues implicated by limitation upon cable T.V. access to public utility poles and rights of way.) It may not be possible to permit access to a proprietary facility simultaneously to all similarly situated persons. Time, place and manner restrictions may be required to preserve the facility for its intended purpose. However, if a need for time, place and manner restrictions to preserve a facility for its intended purpose render the facility a nonpublic forum, there will never be a public forum either by designation or by tradition.

The reality recognized by this Court's precedent is that, by its nature, a public forum created by designation virtually always involves certain viewpoint-neutral restrictions on speech aimed at preserving the facility for its intended purpose.

> The second category, which we have referred to as "limited public forums," consists primarily of government property which the Government has opened for use as a place for expressive activity for a limited amount of time * * * or for a limited class of speakers * * * or for a limited number of topics * * * .

Cornelius, 87 L.Ed.2d at 589-90 (Blackmun J. dissenting). *See also, id.* at 580 (plurality opinion). Accordingly, unless

Cornelius overrules by implication the limited forum cases decided by the Court, the fact that government has placed some restriction on speech cannot prevent space specifically created and dedicated for speech of a particular class from being a limited public forum for such speech.

Contrary to the Eighth Circuit's analysis, the fact that Stadium advertising space has been limited to a few privileged advertisers under 10 year exclusives cannot negate the existence of a designated public forum for commercial advertising. If the plurality opinion in *Cornelius,* and/or the plurality opinion in *Lehman* read in light of *Cornelius,* are now to be read as broadly as the Eighth Circuit's decision, then Justice Blackmun is correct. The Court has written the limited public forum doctrine out of First Amendment analysis.

> The Court's analysis empties the limited public forum concept of meaning and collapses the three categories of public forum, limited public forum, and nonpublic forum into two. The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If the Government does not create a limited public forum unless it intends to provide an "open forum" for expressive activity, and if the exclusion of some speakers is evidence that the Government did not intend to create such a forum, *ante,* at , 87 L.Ed.2d 581-582, no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.

Cornelius, 87 L.Ed.2d at 595. (Blackmun J. dissenting).

The language in the plurality opinion of *Cornelius* to which the Eighth Circuit points is susceptible of this broad reading. However, other language in the opinion would belie such a reading.[8] If an entire line of the Court's decisions is to be overruled and the limited public forum doctrine is to be eliminated from First Amendment analysis, it should not be by implication. In this important area of constitutional law, it is critical that this Court clarify the meaning of the plurality decisions relied upon by the Eighth Circuit. Accordingly, the Court should grant this writ and make it clear to the lower federal courts that government facilities created for and dedicated to a category of expression continue to be limited public forums for such expression after *Cornelius*.

III.

THE COURT SHOULD GRANT THIS WRIT TO CLARIFY THE STANDARD OF REVIEW APPLICABLE TO AN EXCLUSIVE ACCESS POLICY AT A PUBLIC FACILITY.

On its face, the exclusive access grant at issue permits the Commission to amplify the speech of WCCO, while repressing the speech of all equally situated private parties who wish to express a competing point of view on the same subject. While the Commission did not create the exclusive

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[8]In the passage relied upon by the Eighth Circuit, the plurality declares that the government creates a public forum by designation "... only by intentionally opening a nontraditional forum for public discourse." 105 S.Ct. at 3449 cited by the 8th Circuit at 797 F.2d at 555. In a passage not alluded to by the Eighth Circuit, the plurality opinion is careful to note that "The decision of the Government to limit access to the CFC [the forum there at issue] is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum." 87 L.Ed.2d at 582.

access rights at issue for the specific purpose of excluding Hubbard's point of view, the exclusive access policy had this effect. Hubbard's proposed speech was not precluded due to the unavailability of advertising space; Hubbard was denied the right to speak even though space was available because an advertising exclusive had been sold to Hubbard's competitor.

As a matter of settled constitutional law, viewpoint discrimination is absolutely prohibited regardless of whether a public forum or nonpublic forum is involved. *Cornelius,* 87 L.Ed. 585-86; *see also Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 52 (1983). This prohibition is so fundamental that even where speech restrictions are facially neutral, courts must determine whether the restriction is a facade for viewpoint discrimination. It is not surprising, therefore, that the issue of viewpoint discrimination has most often arisen in the context of a facially neutral restriction, where it has been necessary for the courts to determine whether that restriction arose from a desire on the part of government to suppress a particular point of view. *See Cornelius, supra.*

The Eighth Circuit's decision appears to be the first (and only) decision to suggest that where a restriction is viewpoint discriminatory on its face, a challenger must still demonstrate that it arose from the government's desire to suppress a particular point of view. The Court should grant this writ to settle the issue as to the level of scrutiny to be applied to limitations on access which are viewpoint discriminatory on their face. The recent decision of *Los Angeles v. Preferred Communications, supra,* makes it clear that an access exclusive is subject to more than minimal scrutiny, even if all potential speakers are given an

equal chance to bid for it. The opinions in *Perry* suggest, but do not directly establish, that a restriction is unconstitutional unless it passes the strictest scrutiny.

In *Perry*, the school mail system at issue had not been opened to use by the general public and the majority found that it was not a public forum. Thus, the Court determined that a practice permitting access by the recognized teachers' union to the system but denying access to all those not connected with school business, including an unrecognized union, was not subject to strict scrutiny. In his dissent, Justice Brennan confirmed that an exclusive access policy such as that involved here has never been permitted.

> We have never held that government may allow discussion of a subject and then discriminate among viewpoints on that particular topic, even if the government for certain reasons may entirely exclude discussion of the subject from the forum.

460 U.S. at 61-62. (Brennan, J. dissenting).

> . . . once access is granted to one speaker to discuss a certain subject access may not be denied to another speaker based on his viewpoint.

460 at U.S. 64. (Brennan, J. dissenting).

As noted by Justice Brennan, at a practical level, the only reason for an exclusive access policy is to give effect to the favored speaker's desire to exclude rivals from an effective channel of communication. 460 U.S. at 65. Thus, any exclusive access policy must be subject to the most exacting scrutiny. Such a policy can be sustained only if the government can show that the regulation is a "precisely drawn means of serving a compelling state interest." 460 U.S. at 66.

The majority opinion did not challenge any of the principles enunciated by Justice Brennan. It disagreed with Justice Brennan only with respect to the view that the unrecognized union seeking access to the mail system was equally situated with the recognized bargaining representative.

> . . . the system was properly opened to PEA, when it, pursuant to law, was designated the collective-bargaining agent for all teachers in the Perry schools. PEA thereby assumed an official position in the operational structure of the District's schools, and obtained a status that carried with it rights and obligations that no other labor organization could share. Excluding PLEA from the use of the mail service is therefore not viewpoint discrimination barred by the First Amendment.

460 U.S. at 50, n9.

This Court should accept the writ to make explicit that which is implicit from *Preferred* and *Perry* — that, if not unconstitutional *per se,* any practice which has the effect of discriminating between the viewpoints of equally situated speakers is unconstitutional unless it is a precisely drawn means of serving a compelling state interest.

CONCLUSION

This case involves a government body which has permitted one broadcaster, WCCO, to deliver its commercial message in a public facility while at the same time it has denied petitioner, a similarly situated broadcaster wishing to deliver a similar commercial message the right to do so even though there was space available to accommodate petitioner's message. For the foregoing reasons, the petition

for a writ of certiorari to the Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEALS AND CROSS APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 85-5006

Hubbard Broadcasting, Inc., a Minnesota corporation,
Appellee,

v.

Metropolitan Sports Facilities Commission, a public body; and American Sign and Indicator Corporation, a Washington corporation; and Twin City Federal Savings and Loan Association, a Minnesota corporation, and American Sign and Indicator Corporation/Twin City Federal Savings & Loan Association, a joint venture,
Appellants.

No. 85-5011

Hubbard Broadcasting, Inc., a Minnesota corporation,
Appellee,

v.

Metropolitan Sports Facilities Commission, a public body,
Appellant,

and American Sign and Indicator Corporation, a Washington corporation; and Twin City Federal Savings and Loan Association, a Minnesota corporation, and American Sign and Indicator Corporation/Twin City Federal Savings & Loan Association, a joint venture.

No. 85-5014

Hubbard Broadcasting, Inc., a Minnesota corporation,

Appellant,

v.

Metropolitan Sports Facilities Commission, a public body; and American Sign and Indicator Corporation, a Washington corporation; and Twin City Federal Savings and Loan Association, a Minnesota corporation, and American Sign and Indicator Corporation/Twin City Federal Savings & Loan Association, a joint venture.

Appellees.

Submitted: June 12, 1985
Filed: July 8, 1986

Before McMILLIAN and FAGG, Circuit Judges, and WOODS,* District Judge.

FAGG, Circuit Judge.

Hubbard Broadcasting, Inc. (Hubbard), a radio and television broadcaster in the Twin Cities area, appeals the district court's dismissal of its constitutional claims against Metropolitan Sports Facilities Commission (Commission)

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*The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

and others. Hubbard claims that these defendants violated its free speech and equal protection rights by granting its competitor, Midwest Radio and Television, Inc. (Midwest), an exclusive right to advertise on the scoreboard at the Hubert H. Humphrey Metrodome in Minneapolis, Minnesota. We affirm.

In order to provide a facility for major sporting events in the Twin Cities, the Commission authorized construction of the Metrodome. Agreements for use of the Metrodome between the Commission and the two professional sports teams in the area, the Minnesota Twins and the Minnesota Vikings, required a scoreboard system.

Appropriations for construction of the Metrodome, however, did not include funding for a scoreboard system. The Commission learned that several cities with similar sports facilities had financed the construction of a scoreboard system through advertising contracts. Thus, the Commission decided to explore the possibility of obtaining a scoreboard system for the Metrodome at little or no cost to the city by selling advertising space.

American Sign and Indicator Corporation (ASI) manufactures scoreboard systems and markets display advertising on scoreboard panels for stadiums and sports arenas throughout the country. Twin City Federal Savings and Loan Association (TCF) formed a joint venture with ASI (ASI/TCF) in an effort to obtain the exclusive right to market advertising in the Metrodome.

In January of 1981, the Commission entered into a Scoreboard System Agreement with ASI/TCF to finance the construction of a scoreboard system at the Metrodome. Under its terms, the Commission granted ASI/TCF the exclusive right to sell all advertising space on the score-

board for ten years, and ASI/TCF agreed to provide the scoreboard system. The Commission further agreed not to allow any advertising within the Metrodome that would directly compete with the scoreboard advertising. The Commission and ASI/TCF were to share in the revenue generated from the advertising contracts, and title to the scoreboard passes automatically to the Commission after the fifteenth year.

In order to generate the maximum amount of revenue from the limited advertising space available on the scoreboard, ASI/TCF established product categories and sold exclusive advertising contracts to one advertiser within each product category for a ten-year period. The advertising contracts were sold on a first-come/first-served basis.

In the spring of 1982, an ASI/TCF representative sold an exclusive ten-year advertising contract to Midwest. Hubbard then demanded an opportunity to compete for the scoreboard advertising or advertising elsewhere in the Metrodome. The Commission refused Hubbard's demand based on the exclusive advertising provision in the Scoreboard System Agreement.

Hubbard filed this action, claiming (1) the exclusive advertising concept under the Scoreboard System Agreement deprived Hubbard of its rights to free speech and equal protection; (2) the Commission and other named defendants had unreasonably restrained competion for stadium advertising in violation of state and federal antitrust laws; and (3) the Scoreboard System Agreement was void under state law because it violates Minnesota's public bidding laws and because it unlawfully delegates authority to sell or lease advertising space in the Metrodome.

The district court granted the defendants' motions for

summary judgments against Hubbard on its unlawful delegation claim, its first amendment claim, and its equal protection claim. The district court, however, granted summary judgment in favor of Hubbard on its public bidding claim. The antitrust claims were voluntarily dismissed upon consent of the parties.

On appeal, we certified the state law issues of public bidding and unlawful delegation to the Minnesota Supreme Court under Minn. Stat. § 480.061. *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission,* Nos. 85-5006, 85-5011, 85-5014 (8th Cir. 1985) (order for certification). The Minnesota Supreme Court decided both issues against Hubbard and upheld the validity of the Scoreboard System Agreement under Minnesota state law. *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission,* 381 N.W.2d 842 (Minn. 1986). These issues are res judicata to the parties and are no longer before us. *See* Minn. State. § 480.061(7).

Hence, the only issue left for purposes of this appeal is Hubbard's constitutional challenge to the exclusive advertising concept. In order to make a proper determination, our analysis must begin with a consideration of the government property involved and its intended use.

> Recognizing that the Government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes. Accord-

> ingly, the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Similarly, when the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest. Access to a nonpublic forum, however, can be resricted as long as the restrictions are "reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."

Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 Ct. 3439, 3448 (1985) (citations omitted).

Hubbard claims that by selling advertising space within the Metrodome, the Commission has designated the stadium as a public forum for commercial speech. We disagree.

"Not every instrumentality used for communication, however, is * * * a public forum by designation." *Id.* at 3450. A public forum is not created when the government permits limited discourse, "but only by intentionally opening a non-traditional forum for public discourse." *Id.* at 3449. In making this determination, the court may appropriately consider the nature of the property, its compatibility with the expressive activity that is being restricted, and the government's policy and practice to ascertain whether it intended to designate a public forum. *Id.*

Initially, we doubt seriously whether the Metrodome, as a whole, is indeed a public forum. The Commission was established to provide sports facilities in the metropolitan area. *See* Minn. Stat. § 473.552. As a direct result of the Metropolitan Sports Facilities Act, Minn. Stat. § 473.551 *et seq.*, the Commission authorized construction of the Metrodome. *See generally Minnesota Vikings Football Club, Inc. v. Metropolitan Council,* 289 N.W.2d 426 (Minn. 1979).

From the outset, the Commission intended the Metrodome to be a sports complex. The Metrodome is not a place of public assembly intended for the communication of ideas or for the exchange of different points of view. Rather, it is a commercial venture by the city constructed to meet the need for a major sports facility in the Twin Cities area and, at the same time, to provide economic benefits to the area. It follows that the Metrodome does not come within the scope of a traditional public forum. *See, e.g., International Society for Krishna Consciousness, Inc. v. New Jersey Sports and Exposition Authority,* 691 F.2d 155, 159-61 (3d Cir. 1982) (Based on a similar analysis, the Third Circuit held that the Meadowlands Sports Complex in New Jersey was not a public forum.).

We find the issue, however, to be more circumscribed than Hubbard has framed it. Hubbard does not seek general access to the Metrodome but rather limited access in the form of advertising space within the Metrodome. "In cases in which limited access is sought, [the Court has] taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Cornelius,* 105 S. Ct. at 3449. Thus, the crucial question is not whether the Metrodome, as a whole, is a

public forum but whether the Commission designated advertising space within the Metrodome a public forum.

The Supreme Court in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), considered a similar issue to the one before us. There, advertising space on the city's transit system was managed by a private company called Metromedia. Under contract with the city, Metromedia could not sell any space on its transit system for political advertising. A candidate for political office who desired to purchase advertising space to promote his candidacy challenged the constitutionality of the policy.

Recognizing that the city was engaged in commerce in providing commuter service to the residents of Shaker Heights, the Court held that the advertising space on the city's buses did not constitute a public forum. "The [advertising] space * * * is a part of the commercial venture." *Id.* at 303. The Court observed that the "[r]evenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards." *Id.* at 304. Thus, "[i]n cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the Government intended to designate a public forum." *Cornelius,* 105 S. Ct. at 3450; *see also International Society,* 691 F.2d at 160-61.

Here, as in *Lehman,* the city is engaged in commerce. In order to finance the construction of a scoreboard system within the Metrodome, the Commission proposed to sell advertising space within the stadium. ASI/TCF agreed to provide the funding to construct the scoreboard system in

return for the exclusive right to sell the advertising space available on the scoreboard.

Under these circumstances, we find that the city did not intend to designate a public forum by selling advertising space on the scoreboard. Hubbard's claim, taken to its logical extreme, would allow anyone who desired to advertise his product on the scoreboard a first amendment right to do so. No doubt the principal function of the Metrodome would be disrupted by the volume of the expressive activity alone. When, as here, the city, acting in a proprietary capacity, has allowed a small number of commercial advertisers access to a limited amount of advertising space on government property in order to generate revenue, the city has not created a public forum.

Our inquiry, however, does not end here. We must now determine whether the restrictions on the commercial speech involved here are reasonable and content-neutral. *See, e.g., Cornelius,* 105 S. Ct. at 3451; *International Society,* 691 F.2d at 160.

ASI/TCF decided that the most effective way to raise revenue from advertising on the scoreboard within the Metrodome was to sell exclusive ten-year contracts in designated product categories on a first-come/first-served basis. Furthermore, ASI/TCF determined that the exclusive advertising contracts would be more valuable if no competitor were allowed advertising space elsewhere in the Metrodome. This managerial decision to limit access to the advertising space was based upon a reasonable objective to promote revenue. By promoting revenue, the Commission could assure the acquisition of a scoreboard system required under the use agreements with the professional sports teams. *See Lehman,* 418 U.S. at 304.

Furthermore, we conclude that the policy is content-neutral. Here, no effort was made to suppress a particular point of view. Hubbard was not denied access to the advertising space because of the content of its advertisements. Rather, Hubbard was rejected simply because it failed to bid for the advertising space before Midwest. "The method of allocating space is a straightforword first-come, first-served system." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). It follows that the policy was not designed to suppress any particular point of view.

Hubbard also claims that its equal protection rights were violated by the exclusive advertising concept. We disagree. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Texas v. Cleburne Living Center,* 105 S. Ct. 3249, 3254 (1985) (citing *Plyler v. Doe,* 457 U.S. 202, 216 (1982)).

Here, although Hubbard and Midwest are similarly situated, the first-come/first-served policy under the exclusive advertising concept does not discriminate against either broadcaster. In other words, Hubbard does not contend that if it had bid for the exclusive advertising contract before Midwest on identical terms, Hubbard would have been rejected. Nor does Hubbard argue that ASI/TCF should have contacted Hubbard before making a proposal to Midwest.

Although Hubbard complains that it was denied an opportunity to make its bid for the advertising contract before Midwest's bid was accepted, this fact alone does not change

our analysis. Very simply, an ASI/TCF representative first made its proposal to Midwest's officials and Midwest accepted the advertising package that was offered. Thus, ASI/TCF adhered to its policy of granting the exclusive advertising contracts on a first-come/first-served basis. Under these circumstances, we can find no equal protection violation.

Accordingly, the decision of the district court dismissing Hubbard's constitutional claims is affirmed. In accordance with the decision by the Minnesota Supreme Court on certification of issues of state law, we affirm the district court's dismissal of Hubbard's unlawful delegation claim and reverse the district court's judgment in favor of Hubbard on its public bidding claim.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

THIRD DIVISION
3-82 CIV 1299

MEMORANDUM ORDER

HUBBARD BROADCASTING, INC., a Minnesota corporation, d/b/a KSTP-TV, KSTP-AM, INC., and KSTP-FM, INC., a Minnesota corporation,

Plaintiffs,

v.

METROPOLITAN SPORTS FACILITIES COMMISSION, a public body; AMERICAN SIGN AND INDICATOR CORPORATION, a Washington corporation; TWIN CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, a Minnesota corporation; and AMERICAN SIGN AND INDICTOR CORPORATION / TWIN CITY FEDERAL SAVINGS & LOAN ASSOCIATION, a joint venture,

Defendants.

Leonard, Street and Deinard, by SIDNEY BARROWS, Esq., ROBERT LEWIS BARROWS, Esq. and ROBERT DeMAY, Esq., Minneapolis, Minnesota, appeared for plaintiff Hubbard Broadcasting, Inc.

Olson, Gunn & Seran, Ltd., by WAYNE H. OLSON, Esq., DAVID R. KNODELL, Esq., and MICHELLE J. WRICH, Esq., Minneapolis, Minnesota, appeared for defendant Metropolitan Sports Facilities Commission.

This matter comes before the court upon defendant's motions for summary judgment. Defendant Metropolitan Sports Facilities Commission (hereinafter the Commission) moves for summary judgment on Counts I and II of the complaint, raising federal and state free speech claims, and on Counts III and IV, raising federal and state equal protection claims. Defendant also moves for summary judgment on Counts II, IV, VI and VIII through XI on the grounds that those state law claims against the Commission are barred by the eleventh amendment. These motions were brought while defendant's motion for summary judgment on Counts V through XI, made on still other grounds, was pending before the court.

Subsequent to the bringing of these motions, defendant's first motion was in large part denied, except that summary judgment was granted for defendant on Count XI. Defendant's current motion, therefore, is moot as regards Count XI. Plaintiff opposes the motions.

I. *Eleventh Amendment*

Defendant contends that plaintiff's pendent state law claims against it are barred by the eleventh amendment. Defendant relies on *Pennhurst State School & Hospital v. Halderman*, — U.S. —, 104 S. Ct. 900 (1984). In that case, the Court held that the eleventh amendment bars suits against state officials alleging that the officials violated *state* law in carrying out their official responsibilities. *Id.* at 911, 917.[1] The Court further held that "this principle applies as well to state-law claims brought into federal court under pendent jurisdiction." *Id.* at 919.

[1]The Court explained that the exception to the eleventh amendment recognized in *Ex Parte Young*, 209 U.S. 123 (1908), allowing a suit challenging the constitutionality under federal law of a state official's

Defendant claims that the complaint alleges the Commission violated state law in carrying out its official responsibilities. Defendant claims that the Commission is an instrumentality or arm of the state. The Commission was created by the Minnesota legislature and was to consider: the needs of a state university, access to alternative sports facilities in the metropolitan area and in the state, total costs of the facility for all units of government and net gain or loss in property taxes to all local governmental units. The Commission held hearings state wide, state agencies were responsible for the environmental review, and the Commission's chairman and initially two of six members were required to be from outside the metropolitan area. While defendant concedes that it may be characterized as a political subdivision of the state for some purposes, defendant argues that its "state-wide perspective and the special treatment it received in the legislature" make it clear it is not an ordinary subdivision but rather is an arm of the state against whom suit is precluded by the eleventh amendment.

Plaintiff argues that *Pennhurst* did not disturb the long-standing principle that the eleventh amendment does not bar relief against counties and similar municipal corporations. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 280 (1977). Plaintiff claims that the Commission is a municipal corporation or political subdivision, not an arm or agency of the state. The Stadium Act is located among acts creating other metropolitan commissions. Other

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action as a suit not against the State, and the proscription of *Edelman v. Jordan*, 415 U.S. 651 (1974), holding that the eleventh amendment bars retroactive monetary relief but not prospective injunctive relief when a plaintiff sues a state official alleging a violation of *federal* law, were inapplicable in a suit against state officials on the basis of *state* law. *Pennhurst*, 104 S. Ct. at 911.

metropolitan commissions similar to this one have historically been held to be municipal corporations or political subdivisions, plaintiffs say, citing opinions of the Attorney General. Plaintiffs point to a five-part test that should be used in determining whether an entity is an arm of the state or a political subdivision. *See Morrison-Knudsen Co., Inc. v. Massachusetts Bay Transportation Authority,* 573 F. Supp. 698 (D. Idaho 1983). The two most important factors are the financial connection or independence between the entity and the state and the performance of a governmental (*i.e.,* state-wide) versus a proprietary (*i.e.,* local) function. The three lesser factors are: ability of the entity to sue and be sued in its own name, whether the entity can take property in its own name, and whether the entity has an independent corporate status. *Id.*

Plaintiff notes that there is no financial nexus between the Commission and the state treasury: the bonds that financed the stadium were issued by the Metropolitan Council, not the state, and are backed by local taxes and revenues. The Commission's purpose is proprietary, *i.e.,* local in nature: the legislative purpose in Minn. Stat. § 473.5652 says, "the legislature finds that the population *in the metropolitan area* has a need . . . ." (emphasis added). The Commission can sue and be sued in its own name (Minn. Stat. § 473.556, subd. 2) and defendant's argument that such consent cannot be read as consent to be sued in federal courts is, plaintiffs say, blatantly absurd. The Commission is authorized to hold real and personal property in its own name (§ 473.556, subd. 3) and is a public body (§ 473.556, subd. 2). For these reasons, plaintiffs argue, the Commission is not an arm or instrumentality of the

state and thus suit against it is not barred by the eleventh amendment.

The court agrees with plaintiff that the Commission is an entity separate from the state and that the eleventh amendment does not bar this suit on the pendent state law claims. The Eighth Circuit has noted that the key inquiry in determining the nature of an entity created by state law for eleventh amendment purposes is who will pay for any judgment rendered in favor of the plaintiff. *See Miener v. State of Missouri,* 673 F.2d 969, 980 (8th Cir. 1982); *Jackson Sawmill Co. v. United States,* 580 F.2d 302, 308-309 (8th Cir. 1978). The court finds that the commission is financially independent from the state and that any judgment would not have to be paid out of the state treasury. The Eighth Circuit in *Jackson Sawmill Co.,* 580 F.2d at 308 cited the following additional factors:

> Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has been separately incorporated, whether it has the power to sue and be sued and enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations.

Id.[2] The court finds that the Commission performs a proprietary function, is a separately created public body, has the power to sue and be sued and enter into contracts (the subject of this lawsuit) and operates autonomously. Since the Commission is not an arm or instrumentality of

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[2]*See also Cline v. School Dist. No. 32,* 476 F. Supp. 868 (D. Neb. 1979) (applying two-part test of substantial autonomy and financial independence to find school district a political subdivision not protected under eleventh amendment as alter ego of the state).

the state but instead is a political subdivision or municipal corporation, it is not entitled to eleventh amendment immunity and defendant's motion for summary judgment on that basis will be denied.

II. *Free Speech*

Defendant contends it is entitled to summary judgment on plaintiff's free speech claims. Defendant notes that since restrictions on state regulation of speech under the first amendment of the United States Constitution are greater than those under the Minnesota Constitution, a restriction that passes constitutional muster on the federal free speech claim will also be valid on the state free speech claim. Defendant claims that the extent to which the government may limit speech depends upon whether the speech is commercial or noncommercial and whether the speech occurs in a public or nonpublic forum.

Defendant notes in passing that speech proposing a commercial transaction has traditionally been subject to government regulation and has been afforded a more limited measure of protection than noncommercial expression. Defendant concedes that speech in a public forum has been entitled to greater protection than speech that occurs outside a public forum.

Not all public places, however, are public forums, defendant observes, and the stadium is not a public forum. *See International Society for Krishna v. New Jersey Sports & Exposition Authority*, 691 F.2d 155 (3d Cir. 1982). That case upheld a ban on distribution of literature and solicitation of funds at the Meadowlands' Sports Complex. The defendant authority was created by the state legislature to construct and operate a sports complex. The court

found that the resulting racetrack and stadium were not traditional sites like streets and parks stamped with a first-amendment easement nor were they like theatres or auditoriums created for the purpose of public communications. The court said:

> Instead, the Meadowlands is a commercial venture by the state. It is designated to bring economic benefits . . . and is expected to generate at least enough revenue to meet its current expenses and debt service. It earns money by attracting and entertaining spectators with athletic events and horse races. The complex is not intended to be a public forum.

Id. at 161. Defendant claims that this stadium, like the Meadowlands, is a commercial venture, designed to bring benefits and generate revenue, and earns its money by entertaining spectators with athletic events. It is not, defendant says, a public forum.

Defendant contends that while speech in a public forum may only be restricted by reasonable time, place or manner regulations that serve a significant governmental interest, absent a public forum the government may restrict speech so long as the restriction is reasonable. In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), the Court applied this less stringent standard. The Court found that the city's rapid transit vehicles were not a public forum and upheld the city's refusal to accept paid political advertising while accepting other paid advertising. The Court said, "The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of impos-

ing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity." *Id.* at 304. Similarly, defendant argues, the Commission made a reasonable choice to enter into a contract with ASI/TCF and ASI/TCF decided that advertising revenue would be maximized by selling advertising on a product exclusive basis. The greater the advertising revenues, the greater the revenue to the Commission; an arrangement that maximizes advertising revenue is reasonable and does not abridge plaintiff's first amendment rights in a nonpublic forum.

Finally, defendant points to *Heffron v. International Society for Krishna Consciousness Inc.*, 452 U.S. 640 (1981). In that case, the Court upheld against a first amendment challenge a state fair rule requiring all distribution of literature and solicitation of funds to take place from assigned booths. While the Court did find that the state fairground was a limited public forum, the Court nonetheless said that:

> The method of allocating space is a straight-forward first-come, first-served system. The Rule is not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.

Id. at 649. Defendant contends that the Commission's and ASI/TCF's method of allocating advertising space is similarly a first-come, first-served valid time, place and manner restriction. In conclusion defendant argues that its method

of allocating space in the Metrodome, a nonpublic forum, for commercial speech is reasonable. There are no genuine issues of material fact in dispute and defendant contends it is entitled as a matter of law to summary judgment on the speech claims.

Plaintiffs disagrees with the basic assumptions of defendant's analysis. Specifically, plaintiff claims it is immaterial whether the stadium is characterized as a public forum and that while courts employ those labels, "the analysis in public facility cases consistently focuses on whether the proposed speech would disrupt the basic functioning of the facility." "Plaintiffs' Memorandum" at 5. Plaintiff then discusses a number of cases in an attempt to support its "compatibility" test. *Id.* at 6-11. Next plaintiff argues that its proposed speech is compatible with the activities in the stadium, as evidenced by the presence of its competitor WCCO's advertising. *Id.* at 11-13. This compatability, plaintiff says, is in contrast to the basic incompatability found between the proposed solicitation and the functioning of the Meadowlands in *International Society for Krishna v. New Jersey Sports & Exposition Authority,* 691 F.2d 155 (3d Cir. 1982).

Finally,plaintiff argues that the restriction on its advertising is a content-based restriction; plaintiff claims it has been denied the right to advertise because the contents of its advertising would compete with that of WCCO. Even if the restriction is viewed as content-neutral, plaintiff says, the burden of justifying the restriction falls on defendant. Plaintiff contends defendant must show its restriction on commercial speech: (1) implements a substantial government interest; (2) directly advances that interest; and (3) reaches no further than necessary to accomplish that objec-

tive. *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 566 (1980). Defendant cannot meet that burden because ASI/TCF, not the Commission, determined advertising would be sold on an exclusive basis, because the Commission did not investigate to determine whether exclusives would maximize advertising revenues, because the Commission cannot establish that a first-come, first-served basis accomplished any governmental objective, and because no first-come, first-served method was actually used.[3] Thus, plaintiff contends that defendant's motion for summary judgment should be denied.

There can be no doubt that commercial speech, expression related solely to the economic interests of the speaker and its audience, is entitled to first amendment protection. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748 (1976). *See also Bolger v. Youngs Drug Products Corp.,* 103 S. Ct. 2875 (1983); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980); *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). Commercial speech serves the economic interests of the speaker, assists consumers, and furthers the societal interest in the fullest possible dissemination of information. *Central Hudson,* 447 U.S. at 561-62.

At the same time, the Supreme Court has recognized "the 'commensense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S.

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[3]Plaintiff says no announcement was made that requests for advertising could be made at a certain time and place or would be awarded to the first applicants. In fact, ASI/TCF induced plaintiff not to be the first applicant by telling plaintiff it would make a presentation to plaintiff before selling advertising space.

447, 455-456 (1978). The Constitution accords a lesser protection to commercial speech and the protection available for the particular commercial expression turns on the nature of the expression and the governmental interests served by its regulation. *Central Hudson,* 447 U.S. at 563.

The relationship between the protection accorded commercial speech, as set forth in the *Virginia Pharmacy Board, Bates, Central Hudson* and *Bolger* line of cases, and the protection accorded other speech, based in part on distinctions drawn between content-based regulations and time, place, manner regulations and on the public forum-nonpublic dichotomy, is less than clear. A review of the parties' briefs and of the leading cases shows a developing area of the law. Defendant for the most part appears to ignore the commercial speech cases and prefers instead to rely on the public forum-nonpublic forum cases. Plaintiff repudiates the public forum language and proposes a "compatability of proposed use with the facility" test. Plaintiff also relies on the four-part commercial speech test set forth in *Central Hudson,* arguing that defendant has not met its burden of justifying the restriction under that test.

Despite this doctrinal confusion, the commercial speech cases do provide the court with some guidelines. The Supreme Court in *Virginia Pharmacy,* for example, struck down a ban on advertisement of prescription drug prices. The ban was clearly a content-based restriction. In concluding that commercial speech was protected by the first amendment, the Court cautioned that it did not mean to suggest that such speech could never be regulated in any way. The Court said that some forms of regulation were surely permissible and as an illustration said:

> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and in so doing they leave open ample alternative channels for communication of the information. . . . Whatever may be the proper bounds of time, place, and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute. . . .

Virginia Pharmacy Board, 425 U.S. at 771 (citations omitted). *See also Bates,* 433 U.S. at 384.

The Supreme Court has developed a four-part test for assessing the validity of restrictions on commercial speech. That test asks: first, whether the expression is constitutionally protected, that is whether it at least concerns lawful activity and is not misleading; second, whether the asserted governmental interest is substantial; third, whether the regulation directly advances that interest; and fourth, whether the regulation is not more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 566 (1970). The Court applied the test in that case to invalidate a ban on advertising by electric utilities that promoted the use of electricity. The Court recently used the same analysis to invalidate a statute prohibiting the mailing of unsolicited advertisements for contraceptives. *Bolger v. Youngs Drug Products Corp.,* 103 S. Ct. 2875 (1983). In a footnote, however, the Court specifically noted that the government did not attempt to justify the statute as a time, place or

manner restriction nor, said the Court, would such a characterization be tenable in light of the statute's content-based prohibition. *Id.* at 2882, n.18.

It seems to this court, then, that a crucial inquiry in the analysis of commercial as well as noncommercial speech asks whether the restriction is content-based or a time, place, manner regulation. A commercial speech restriction or ban that is content-based should be analyzed under the law as set forth in *Virginia Pharmacy Board, Bates, Central Hudson* and *Bolger,* particularly under the four-part test developed and applied in the latter two cases. All of those cases involved total prohibitions on particular types or classes of advertising (prescription drug prices, lawyers' price advertising, advertising by electric utilities that promoted the use of electricity, and advertising of contraceptives), clearly content-based restrictions.

On the other hand, a commercial speech restriction that is a mere time, place, manner restriction should apparently be analyzed differently. *Virginia Pharmacy* notes that such restrictions must be justified without reference to the content, must serve a significant governmental interest and must leave open ample alternative channels for communication of the information.[4] *See also Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535-36 (1980); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 93-94 (1977); *Erznoznik v. City of Jacksonville* 422 U.S. 205, 209 (1975).

The restriction in this case does not totally ban particular kinds of advertising in the Metrodome. Advertising by a number of different kinds of advertisers is, of course, precluded by the sale of product exclusives. Since Cola-Cola is advertised in the Dome, for example, Pepsi-Cola is pre-

cluded from advertising; since WCCO advertises, KSTP cannot. Plaintiff's contention that the restriction is content-based because plaintiff's content competes with WCCO's content, however, does not make sense. Each precluded advertiser could make the same argument and obviously it would be very difficult to define the "content" of the wide variety of speech excluded. In contrast, the *Virginia Pharmacy, Bates, Central Hudson* and *Bolger* cases all involved total prohibitions on a particular type of advertising. Even in the noncommercial speech cases, a content-based restriction is one that suppresses speech because of the particular point of view to be expressed.[5] The regulation at hand is clearly not content-based.

Instead, the restriction is a time, place, manner restriction and will be analyzed under the three-part test set forth in *Virginia Pharmacy,* 425 U.S. at 771. Hubbard is pre-

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[4]Justice Steven's concurrence in *Bolger,* 103 S. Ct. at 2888, explains his concerns about the possible problems created by rigid distinctions between commercial and noncommercial speech. He wrote,

> [T]he Court's opinion creates the impression that "commercial speech" is a fairly definite category of communication that is protected by a fairly definite set of rules that differ from those protecting other categories of speech. . . .
>
> . . . .
>
> Because significant speech so often comprises both commercial and noncommercial elements, it may be more fruitful to focus on the nature of the challenged regulation rather than the proper label for the communication. . . .
>
> . . . .
>
> It matters whether a law regulates communications for their ideas or their style. Governmental suppression of a specific point of view strikes at the core of First Amendment values. In contrast, regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his [or her] environment. . . .

Id. at 2888-2889 (footnote omitted).

[5]*See, e.g., Police Department of Chicago v. Mosley,* 408 U.S. 92, 95 (1972).

vented from advertising in the Metrodome because advertising is sold on an exclusive-by-product basis. Obviously not every advertiser who wishes to buy space in the Metrodome may do so. The Supreme Court has observed that two parades cannot march on the same street simultaneously, and government may allow only one. *Cox v. New Hampshire,* 312 U.S. 569, 576 (1941). It is true, as plaintiffs note, that not all the available advertising space in the Metrodome is occupied. Nonetheless, government may restrict speech if it serves a significant governmental interest and that interest may extend beyond mere physical space limitations. The Supreme Court has said,

> A demonstration or parade on a large street during rush hour might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox v. Louisiana,* 379 U.S. [536], at 554 [(1965)]. If overamplified loudspeakers assault the citizenry, government may turn them down. *Kovacs v. Cooper,* 336 U.S. 77 (1949); *Saia v. New York,* 334 U.S. 558, 562 (1948)

Grayned v. City of Rockford, 408 U.S. 104, 115-116 (1972). In *Grayned,* the Court upheld an antinoise ordinance that was narrowly tailored to further the city's compelling interest in having an undisrupted school session conducive to the students' learning. *Id.* at 119. The essence of time, place or manner regulation lies in the recognition that various methods of speech, regardless of their content, may frustrate legitimate governmental goals. *Consolidated Edison Co.*, 447 U.S. at 536.

In this case, the Commission asserts that ASI/TCF de-

termined that advertising exclusives would maximize advertising revenue. The Commission says it had no reason to question that determination. Plaintiff argues that ASI/TCF, not the Commission, decided to sell exclusives and that the Commission never investigated to determine whether product exclusives would maximize advertising revenue.

Plaintiff's own argument undercuts the presence of governmental action necessary to find a first amendment violation, but the court will assume for purposes of argument that the Commission's agreement in the scoreboard contract not to sell advertising elsewhere in the stadium if it competes with advertising exclusives, together with its grant to ASI/TCF of the exclusive right to sell stadium advertising, constitutes the requisite governmental or state action.[6] If the decision to sell advertising exclusives is imputed to the Commission for purposes of finding state action, it also seems logical to conclude that the sale of advertising exclusives was intended to further the joint objective of ASI/-TCF and the Commission in maximizing revenue. The Commission facilitated sale of exclusives by its agreement not to sell competing space. Maximizing revenue is obviously an important governmental objective, especially in the context of a complex intended as a commercial venture by the state. The Dome, like the New Jersey Meadowlands, is designed to bring economic benefits, to generate revenue to meet current expenses and debt service, and to earn money by entertaining spectators with athletic events. The Commission operates the stadium in a proprietary fashion, not as part of its traditional governmental functions. The Commission and ASI/TCF could quite logically conclude that advertisers would pay more for the right to

[6]The parties have not raised this issue.

be the only advertiser in their product category than they would pay to be one of several advertisers. This court cannot say that the sale of advertising exclusives does not serve a significant governmental interest.

Furthermore, the challenged restriction leaves open ample alternative channels for communication of the information. Hubbard and other advertisers precluded from the Metrodome are not prevented from advertising in other places. Hubbard, for example, employs numerous billboard, newspaper, magazine, bus displays, television ads and the like to promote its KSTP stations. While plaintiff argues that "[O]ne is not to have the exercise of his [or her] liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place," *Schneider v. State,* 308 U.S. 147, 163 (1939), that case dealt with ordinances prohibiting the distribution of handbills on public streets, which the court noted were "natural and proper places for the dissemination of information and opinion" *id., i.e.,* they were public forums. In addition, the regulations did not regulate or license distribution but absolutely prohibited it. Those ordinances were a far cry from the reasonable time, place, manner restriction involved in this case. Finally, those ordinances did not restrict commercial speech.

In discussing the distinctions between the protections afforded commercial and noncommercial speech, the Supreme Court has said:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to

> the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.

Ohralik v. Ohio State Bar Assoc., 436 U.S. 447, 456 (1978). In this case, the court has analyzed this time, place and manner restriction of commercial speech under the same standards that would be applied to a time, place, manner restriction of noncommercial speech in a public forum. In other words, the court has viewed the law as well as the facts in the light most favorable to plaintiff. Even if the Metrodome were a public forum, and the similarities between this stadium and the Meadowlands complex convince the court that the Dome is not a public forum, and even if the public forum-nonpublic forum distinction were relevant in commercial speech cases, the court finds that the restriction challenged here: (1) is not content-based, (2) serves a significant governmental interest in maximizing advertising revenue, and (3) leaves open ample alternative channels of communication. The challenged practice of selling advertising exclusives-by-product is a reasonable time, place and manner restriction of commercial speech.[7] Accordingly, plaintiff cannot prevail on its free speech claims as a matter of law. The court further finds that there are no genuine issues of material

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[7]Even if the challenged practice is viewed as content based, the court finds that the asserted governmental interest in maximizing revenue is substantial, the sale of exclusives by product directly advances that interest, and the regulation is not more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. 557.

fact in dispute. Defendant's motion for summary judgment will be granted.

III. *Equal Protection*

Defendant contends it is entitled to summary judgment on Counts III and IV of the complaint, alleging violations of federal and state equal protection by defendant's refusal to sell advertising to plaintiff while allowing other similarly situated advertisers to purchase such advertising. Defendant notes that the standards of the equal protection clause of the fourteenth amendment and the equality clause of the state constitution are the same. Relying on *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), defendant argues that denial of some opportunity to a latecomer because of a first-come, first-served policy is not a denial of equal protection. Advertising was sold on a nondiscriminatory first-come, first-served basis, defendant says, and like the groups who wished to solicit in *Heffron,* some potential advertisers were necessarily denied space at the Dome because of the limited amount of space available.

Plaintiff contends that access to a public forum cannot be restricted because of the content of the message. No governmental interest has been identified as being advanced by the differential course of treatment. While a first-come, first-served method might be appropriate in some circumstances, that was not the method used here. No announcement was made that requests for advertising could be made at a given time and place and in fact ASI/TCF induced plaintiff not to be the first applicant by telling plaintiff it would make a presentation to plaintiff before selling space.

It is axiomatic that the standard of review of govern-

mental action employed in an equal protection case depends upon whether a fundamental right or suspect class is involved. The presence of either a fundamental right or suspect class triggers strict scrutiny and the governmental action must be necessary to promote a compelling governmental objective. *See, e.g., Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 312 n.3 and 4 and accompanying text (1975). Absent a fundamental right, such as free speech, or a suspect class, the regulation is scrutinized under the rational basis test and is upheld if the regulation is rationally related to an ultimate governmental objective. *Id.* at 314.

In this case, no suspect class is present. The court's analysis of plaintiff's free speech claims shows that no fundamental first amendment rights were infringed by defendants' actions. *See* part II, *supra.* Accordingly, the court must apply the rational basis test. The court cannot substitute its judgment for that of another governmental body. The court finds that the sale of advertising by product exclusives and the Commission's actions in enforcing those exclusives are rationally related to the legitimate objective of maximizing revenue. Thus, plaintiff as a matter of law has not been denied equal protection. There are no genuine issues of material fact in dispute and defendant's motion for summary judgment will be granted.

Upon the foregoing,

IT IS ORDERED That defendant's motion for summary judgment on Counts II, IV, VI, VIII, IX and X be and the same hereby is denied.

IT IS FURTHER ORDERED That defendants' motion for summary judgment on Counts I, II, III and IV, the free speech and equal protection counts, be and the same hereby is granted.

DATED: August 20, 1984.

DONALD D. ALSOP
United States District Judge

Supreme Court, U.S.
FILED
NOV 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-552

IN THE

Supreme Court of the United States

October Term, 1986

HUBBARD BROADCASTING, INC.,

Petitioner,

vs.

METROPOLITAN SPORTS FACILITIES COMMISSION; AMERICAN SIGN AND INDICATOR CORPORATION; TWIN CITIES FEDERAL SAVINGS AND LOAN ASSOCIATION; AND AMERICAN SIGN AND INDICATOR CORPORATION / TWIN CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, A JOINT VENTURE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE OF METROPOLITAN SPORTS COMMISSION IN OPPOSITION TO PETITION

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STATEMENT OF THE CASE

Petitioner Hubbard's statement of the case fails to emphasize five important facts: (1) the Stadium is a commercial venture; (2) the sale of scoreboard system advertising panels is a commercial venture; (3) this case concerns only *commercial* speech to which the Constitution accords less protection than other expression;[1] (4) the Commission

wanted no more advertising space than was necessary to obtain a free scoreboard; and (5) ASI/TCF sold the available advertising space without direction from the Commission as to (i) product category, (ii) potential advertisers, or (iii) marketing method.

Hubbard's statement of the case is wrong in two important respects.

First, Hubbard insinuates that the lower courts were wrong to recognize that the sale of advertising space on an exclusive-by-product-category basis maximizes revenues from the limited space available, Petition Appendix A-4, -9, -27 to -28, by inaccurately summarizing two portions of of the record, Poss App. 234, Turner App. 256. Petition 4.[2] In fact, Hubbard's president agreed that being an exclusive advertiser has an economic benefit. Hubbard App. 181 1.24 to 182 1.2. Hubbard's real concern, that its competitor had the exclusive, Hubbard Deposition, Commission Ct. of App. Reply Br. Add. 16 1.20 to 17 1.18, demonstrates how exclusives maximize revenue.

Second, Hubbard incorrectly claims that space was available for its advertisement. Petition 5. When the Stadium

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[1] *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505-07, 513, 514 (1981), *Central Hudson Gas and Electric Corporation v. Public Service Commission*, 447 U.S. 557, 562-63 (1980), *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56 (1978), *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977), *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 69 n.32 (1976), *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 248, 773 n.24 (1976).

[2] While Poss, the Commission's Executive Director agreed that he did not make an independent investigation, his "general judgment" based on his dealings with other stadium managers and scoreboard suppliers was that the exclusive-by-product-category basis would maximize revenues. Turner, the ASI salesman did not concede that he did not know whether sale of advertising on a nonexclusive basis could be as profitable: he agreed that he had not tried to sell advertising on a nonexclusive basis; he knew that other scoreboard manufacturers sold advertising on an exclusive basis; he did not know if any sold advertising on a nonexclusive basis.

opened, two scoreboard advertising panels remained unsold. However, those panels were not available to a soft drink company, a brewer, a tobacco company, a fast food chain, a hardware store chain, a financial institution or a broadcaster because space had been sold in each of those product categories on an exclusive basis. To any prospective advertiser in each of those categories, only one space was available, and it was sold on a simple, non-discriminatory first-come, first-served basis.

Finally, one set of facts is totally absent from Hubbard's statement of the case. More than two years before the Commission entered into the scoreboard contract, more than three years before ASI/TCF sold advertising space, Hubbard had been invited to participate in a scoreboard system proposal, knew that advertising might be sold on an exclusive basis, was concerned that WCCO might obtain the broadcaster advertising space, and knew that TCF was a likely participant in the Stadium scoreboard system. Hubbard App. 174-78.

ARGUMENT

Hubbard argues for review on the grounds that the Eighth Circuit's public forum analysis (and consequent conclusion) conflicts with *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. —, 87 L.Ed. 2d. 567 (1986) and decisions in other circuits. However, there is no requirement, even for a limited public forum, that a public facility must be expanded to accommodate more speakers where the existing space has been allocated fairly. *See, Heffron v. International Society of Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981). Hubbard's effort to find fault with the Eighth Circuit's public forum analysis is a desperate attempt

to obscure an obviously correct result and elevate application of a means of analysis to the ultimate issue.

Hubbard also attempts to obtain review by inserting a viewpoint neutrality issue into this case. It claims viewpoint discrimination because WCCO is on the scoreboard and Hubbard is not. However, WCCO is on and Hubbard off because of limited space and the action and inaction of WCCO and Hubbard in seizing the opportunity, not governmental action.

Hubbard attempts to evade *Heffrons* approval of "first-come, first-served" space allocation, by claiming that a "first-approached, first-served" allocation system was used rather than "first-come, first-served." Hubbard's semantics ignore the fact that ASI/TCF had to make its first sales call somewhere.

ASI/TCF, not the Commission, decided how to market the space. ASI was in the business of selling advertising on scoreboard advertising panels. It knew whom the potential advertisers were and how much they would pay. Obviously, ASI would sign up the first advertiser in a category who expressed a willingness to pay the going rate. Hubbard had ample opportunity to be the first broadcast advertiser. Hubbard had known for three years about the potential sale of advertising on an exclusive basis and knew that advertising space for a broadcaster was about to be sold before the sale to WCCO. But Hubbard sat back and waited.

The actual holdings of the cases from other circuits which Hubbard cites are not in conflict with the Eighth Circuit's decision in this case. None of those cases involved all the elements of this case: a governmental commercial venture; a claim that *commercial* speech was wrongly abridged; limited space available for speech; and no government, content-based discrimination.

Only *American Future Systems, Inc. v. Pennsylvania State University*, 752 F.2d 854 (3rd. Cir. 1984) *cert. denied sub nom Johnson v. Pennsylvania State University*, — U.S. —, 87 L.Ed. 2d (1985) involved commercial speech. It upheld the challenged regulation. In *International Society for Krishna Consciousness, Inc. v. New Jersy Sports and Exposition Authority*, 691 F.2d 155 (3rd Cir. 1982), the Third Circuit held that a major public sports complex is a nonpublic forum.

Lebron v. Washington Metro Area Transit Authority, 749 F.2d 893 (D.C. Cir. 1984) and *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States*, 708 F.2d 760 (D.C. Cir. 1983) both involved political speech. In *Lebron* there was no public forum dispute or space availability question; the denial of speech was based on content. *Namibia*, the *Dulles Airport case*, recognized revenue maximization as valid for regulating advertising space and first-come, first-served as appropriate for allocating limited advertising space in a public forum. 708 F.2d at 768, 771-73.

Planned Parenthood Association v. Chicago Transit Authority, 767 F.2d 1225 (7th Cir. 1985) turned on the blatant discrimination by the public body against the social-political content of the advertisement. The advertising space had long been used for public interest and political-social speech as well as commercial advertisement. Space availability was not a factor.

Neither *San Diego Committee Against Registration and the Draft v. Governing Board*, 790 F.2d 1471 (9th Cir. 1986), nor *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985) *aff'd and dem'd sub nom. City of Los Angeles v. Preferred Communications*,

Inc., 476 U.S. —, 106 S.Ct. —, 90 L.Ed. 2d (1986) involved *commercial* speech, a government commercial venture or limited space. The first turned on content based discrimination; the second on the potential for it.

CONCLUSION

Respondent Commission urges the Court to deny the writ of certiorari.

The decision below does not conflict with decisions of the Court or other circuits. Neither the Commission nor ASI/TCF preferred the speech of Hubbard's competitor over Hubbard's speech. The first-come, first-served allocation of advertising space did not permit covert discrimination.

Finally, although it was expedient in the lower courts to address this case in terms of "commercial speech" and "public forum" principles, there is, as the district court noted, Petition Appendix A-27, a substantial question about whether governmental action, which would necessitate the first amendment analysis, was even present in this case.

Respectfully submitted,

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